84-829

No. _____

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES J. PRYOR,

PETITIONER PRO SE,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES J. PRYOR
PETITIONER PRO SE
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Augusta, Georgia
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5210

QUESTIONS PRESENTED FOR REVIEW

1. Is it true that the Tax Court Decision was shockingly wrong since the decision was based on no evidentiary support whatsoever, which the Supreme Court has repeatedly interpreted as lack of due process of law, as demonstrated in three cases cited and explained in this petition?

2. Was this taxpayer denied due process when the Tax Court, because of the large number of critical errors in the decision and the misconception of the facts of the case, made the decision on an imaginary case that was in no way similar to the petitioner's case, which in effect means the tax court did not make a decision on his case?

3. Was this taxpayer denied due process when the Tax Court Decision did not even mention the cause of the

casualty damage, probably the most important thing in the case, even though the cause was explained repeatedly by the petitioner in the court record and also in the briefs? Was there further lack of due process when the Tax Court erroneously implied the broken curbing was the cause of the sudden water damage even though the sunken ground, the sunken asphalt, and the earthen dam were explained by the petitioner to be the cause of the damage?

4. Was this taxpayer denied due process since statistics provided by the Clerk of the Atlanta Appeals Court indicate that a petitioner pro se in the Atlanta Appeals Court has virtually no chance to win a favorable decision, even if 100% correct and the respondent 100% wrong? Why has no one who has represented himself won a decision in many years in these Atlanta courts? Would any reasonable person who hears these alarming statistics conclude that anyone

who represents himself in the Atlanta Appeals Court has no chance to win a favorable decision and thus should not expect due process in this court?

5. Was the theory of the government engineer and the Tax Court that the sinking of the sand under the patio slabs was responsible for the $20,000 damage mere conjecture, not supported by any witness, proof, or evidence whatsoever? Did the fact that none of the slabs dropped downward even a fraction of an inch in seven years after construction in 1969, which was a fact of the case, prove conclusively that the sand did not sink any whatsoever and that this theory of the engineer and the Tax Court was erroneous?

6. Did the Tax Court think there was only one slab, and furthermore that this one huge slab was supported by the adjacent walls whereas the record clearly shows repeatedly that there were four separate slabs and these slabs derived no support

whatsoever from the adjacent walls? Did these two significant errors cause the Tax Court to make an erroneous explanation of how the damage occurred and thus cause the erroneous Tax Court Decision?

7. Did the Tax Court err by listing under findings of fact that "percolation of water through the sand beneath the slab would cause the sand to consolidate and compact, thereby lowering the level of the sand and removing the support the sand gave the concrete slab?" Was this merely an unproved theory, or an educated guess, that should not have been referred to as a factual matter by the Tax Court?

8. Did the taxpayer by testimony of two expert appraisers prove that he experienced a $20,000 casualty loss, caused by the sudden sinking of the ground and collapse of the asphalt and the sudden formation of an earthen dam? Did these two acts of nature cause a deluge or flood of water from the steep hillside to enter

the ivy beds and thus get under the concrete platform and cause severe damage to the concrete platform and the retaining concrete block walls, both of which had been in perfect condition for seven years? Did the taxpayer prove that the casualty damage was sudden, unexpected, and unusual, meeting all the criteria required for a casualty loss?

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JAMES J. PRYOR,

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COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, James J. Pryor, respectfully prays that a writ of certiorari issue be granted to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered on October 16, 1984.

OPINION BELOW

The Court of Appeals entered its decision October 16, 1984, affirming the Decision of the United States Tax Court. A copy of the Appeals Court Decision is attached as Appendix A. A copy of the Decision of the United States Tax Court is attached as Appendix B.

JURISDICTION

On October 16, 1984, the Court of Appeals entered judgement affirming the Decision of the United States Tax Court in favor of the respondent. (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> Nor shall any person be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

This case is a dispute as to whether or not the petitioner experienced a

casualty loss at his lakefront property in 1976. The lower court held on November 23, 1983 that the petitioner did not prove he had experienced a casualty loss and the Eleventh Circuit Court of Appeals on October 16, 1984 affirmed the tax court decision without comment or explanation.

The record clearly shows that the concrete platform consisting of four separate slabs, had been in perfect condition for 7 years following its construction in 1969. (Tr. 13, 14, 17, 18)* The Engineer and the Tax Court did not contest the fact that the area had for seven years looked perfect on the patio surface and that there was no indication of anything going wrong under the patio slabs. The Engineer thought damages were going on under this platform that could not be detected by observation of the property owner from the surface of the patio. (Engineering Report, p. 4)

*"Tr." refers to Transcript.

The concrete platform rested on sand, which the engineer testified is a excellent support for enormous heavy structures, even tall buildings, if the sand is properly compacted. (Tr. 106) Testimony by the builder proved that the sand had been properly compacted. (Tr. 54, 70)

In February 1976, when my wife and I visited the site after an absence of several weeks, we were shocked to find damage so severe that it looked like it may have been caused by an earthquake or a bomb of some type. (Tr. 14) The two side concrete block walls had leaned so far to the side that it looked as though both walls would completely collapse at any minute. (Tr. 14) The two concrete slabs next to the side walls had dropped downward 8-10 inches. (Tr. 14)

I called the builder at once about the matter and he was there at the site in less than an hour. (Tr. 14) When a person has a catastrophe of this type,

it is only natural that you want to determine the cause of the damage. The builder was of the opinion that a huge amount of water had gotten under the concrete slabs, softened the footings of the side retaining walls, and the pressure from this water had resulted in the collapse of the side walls and the patio slabs. (Tr. 18) The government Engineer on page 4 of his Engineering Report also stated that in his opinion a huge amount of water had caused the collapse of the side walls and patio slabs.

Since both the builder and the Engineer agreed that excess water had caused the collapse of the side walls and patio slabs, let us now examine some of the facts and evidence in the case and see where all this huge amount of water came from. The concrete platform area had been designed so that a tall asphalt curbing would keep water out of the ivy beds and thus protect the concrete plat-

form and the mobile home from large quantities of water that would drain from the hillside. (Tr. 13) I had observed the curbing many times during extremely heavy rainstorms and not once had I ever seen a drop of water get anywhere near the top of the curbing. (Tr. 23) The builder and I inspected the area where the curbing was located and found two places where it was obvious that large quantities of water had entered the beds of ivy next to the curbing. (Tr. 18) On one side of the tall curbing, the ground had sunk down, causing a 6ft. x 6ft. section of asphalt to collapse, including the six feet of curbing attached to it. (Tr. 18) On the other side of the curbing, an earthen dam had formed and this caused another area where water spilled over the curbing into the ivy beds. (Tr. 18, 19) In both spots, you could see a large amount of debris, pine needles, leaves, twigs, and pine cones, proof that in these two exact areas

large quantities of water had entered the ivy beds, where it apparently passed from there under the concrete slabs and caused all the severe damage. (Tr. 18)

This was a perfect example of a casualty loss. The identifiable event that caused the damage was the sunken ground and the earthen dam. (Tr. 18, 21, 24, 36, 37, 46) Both of the causes were sudden because they occurred over a relatively short period of time. (Tr. 13, 14, 18, 24, 37, 46, 48) Neither cause was gradual or progressive. The causes of the damage were not there on one visit to the lake and were there on the next visit. (Tr. 13, 14, 18, 24, 37, 46, 48) Grant v. Commissioner, 30BTA 1028 (1934), also a case of sinking of the ground, is referred to by all courts as a sudden event even though the ground continued to sink for 7 years. Surely this event would be sudden since the ground sunk down during a three month period. It was obvious that the

causes were unexpected and unusual and not due to the willful actions of the property owner. Sinking of the ground is regarded by the courts as a subterranean occurrance, the cause of which is unknown.

The sinking of the ground caused the asphalt above it to collapse, since the asphalt and the curbing attached to it depended on the ground for its support. Subsidence or sinking of the ground is approved by the courts and the Internal Revenue Service as a casualty loss, as much as a fire, an earthquake, or a flood. My case is identical to the Grant case, which was a case of sinking of the ground. No court has ever questioned the validity of the Court Decision in the Grant case. An earthen dam, the other cause of the damage, is in the same category as sinking of the ground. Both were the result of natural forces and beyond the control of man. Both causes were identified by the builder and the taxpayer at the same time

the severely damaged patio structures were discovered. (Tr. 18, 20, 21, 36, 37, 46, 47, 48)

The respondent, which was the Internal Revenue Service, claimed there was no casualty and based its case entirely on the testimony of a government engineer. The engineer explained in his Engineering Report and also testified at the trial that he thought all the damage to the petitioner's property was due to percolation of water under the concrete slabs which caused consolidation or sinking of the sand. (Tr. 112) The Engineer blamed the consolidation on routine rainfall that entered the ivy beds over a 7 year period. (Tr. 119) The engineer did not have any evidence or even a single witness to offer in support of his theory, making the theory little more than an educated guess.

Two well qualified and experienced appraisers testified that the enormous

damage to the retaining concrete block walls and the concrete platform had caused a reduction in the fair market value of the property of twenty thousand dollars (Tr. 73, 83, 89, 99) Since this amount was not disputed by any other expert, this became a factual matter as to the exact amount of the casualty damage. The IRS had only one person other than the engineer to testify during the trial. Since this person was a real estate appraiser, he did not offer any testimony about the cause of the damage. He had not sold any homes in the Clark Hill area and was not familiar with the area so he offered no opinion as to the amount of the casualty damage, other than an estimated cost of repairing a small portion of the damaged patio area. As pointed out in my briefs for the Tax Court and the Appeals Court, several courts have ruled that estimates of repairs cannot be used to determine the amount of a casualty loss

The amount to repair damage may be considered but not an estimate to repair the damage.

REASON FOR GRANTING THE WRIT

1. THE DECISION OF THE TAX COURT WAS SHOCKINGLY WRONG WITH NO EVIDENCE WHATSOEVER TO SUPPORT THE TAX COURT DECISION.

The book Supreme Court Practice points out that the Supreme Court has on a number of occasions granted certiorari to review matters of evidence in cases where the decision below seems to be shockingly wrong and thus present substantial due process questions, which I maintain is characteristic of the erroneous decision in this current case. An example of one such case that was shockingly wrong is the case of Thompson v. City of Louisville, 362 U.S. 199. In this case, the Supreme Court stated that the ultimate question presented was whether the loitering and disorderly conduct charges against petitioner "were

so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment and that the decision of this question "turns not on the sufficiency of evidence, but on whether this conviction rests upon any evidence at all." Also in Garner v. Louisiana, 368 U.S. 157, 163, state court convictions for disturbing of the peace were reviewed and reversed because they were so devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. Furthermore, a similar case is Washington v. United States, 357 U.S. 348, where a federal conviction was reversed without elaboration "because of the insufficiency of the evidence." This current case is in the same exact category as these three foregoing cases because the Decision of the Tax Court was based on no

evidence whatsoever, thus presenting due process questions.

2. THE TAX COURT DECISION REPRESENTED AN ENORMOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, CAUSED BY MANY CRITICAL ERRORS AND ERRONEOUS CONCLUSIONS.

Rule 17 of the Rules of the Supreme Court states that one type of reason that will be considered for review on writ of certiorari is a case where a lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision, or when a federal court of appeals has sanctioned such a departure by a lower court.

Since the Tax Court Decision was based on no evidence whatsoever, this current case is a perfect example of a lower court departing from the accepted and usual course of judicial proceedings. Furthermore, this lower court made so

many significant errors in determining the facts of the case that it made a decision on an imaginary case that was completely different than petitioner's case, which is a perfect example of lack of due process. I think it is essential to explain to the Supreme Court these flagrant errors by the Tax Court in order to prove that this lower court grossly departed from the accepted and usual course of judicial proceedings. These huge number of errors demonstrate that the Tax Court for some reason had little familiarity with the facts of the case or the testimony and evidence in the record. The fact that this departure from the accepted and usual course of judicial proceedings and this shockingly wrong decision was sanctioned by the Eleventh Circiut Court of Appeals should be of considerable significance to the Supreme Court and the basis for granting a writ of certiorari to

review these lower court decisions.

THE FOLLOWING ARE SOME OF THE MANY FLAGRANT ERRORS BY THE TAX COURT:

(a) A very important error was the fact that the Tax Court failed to mention in the decision what the petitioner identified numerous times as the cause of the casualty. One might say that a trial judge cannot be expected to mention in his decision every argument made by a party. I certainly agree with that, but in a casualty loss case, probably the most important thing in the case is what the petitioner maintains is the cause of the casualty damage and if this is not identified, I maintain this is a serious error by the Court, a violation of normal judical procedure, and a perfect example of lack of due process.

(b) To make matters worse, the Tax Court made another significant error by proceeding to make all the decision as though the broken curbing was the cause

of the casualty. (Decision, p. 13) The petitioner thought the broken curbing had no relation to the damage and certainly was not the cause of the casualty. The sunken ground and the sunken asphalt, as well as the earthen dam, were the causes of the damage, as clearly explained by the petitioner in the trial and in all the briefs.

(c) I want to now mention another important error. Throughout the entire decision, the Tax Court always uses the term "slab", indicating it thought there was only one slab making up the entire concrete platform. The Tax Court used the word "slab" 27 times in the court decision and not once did the court use the word "slabs". The record clearly shows the concrete platform consisted of four separate slabs. (Tr. 14, 29) Any reasonable person reading the decision would conclude that the court thought there was only one slab since not once

did the court use the plural of the word.

(d) The Tax Court made the error of thinking there was only one huge slab and furthermore erroneously thought this slab rested on the retaining concrete block walls. That is why on page 12 of the Tax Court Decision it states: "so that over a period of time the sand settled away and left the slab with no direct support except the walls." The decision goes on to say that the walls were not strong enough alone to support the slab so the slab cracked and dropped downward. The Tax Court said this was "the most reasonable explanation of how the damage occurred." The taxpayer, the builder, and the engineer testified that the concrete was supported 100% by sand and also that there were four separate slabs, not one as imagined by the Tax Court. (Tr. 14, 29, 54, 123) The drawing on the last page of the Engineer's Report

clearly shows the concrete platform was supported by sand and not the retaining walls. How could the tax court confuse this important point when it was explained repeatedly in the court testimony by everyone connected with the case?

(e) The Tax Court also made an additional error by listing the theory of consolidation under findings of fact. No human being has ever seen any consolidation of sand under the patio. This was merely a theory and should not have been listed as though it was a fact. To prove that the Tax Court and the Engineer were both wrong by thinking consolidation of sand had occurred under the slabs, it is necessary to understand that none of the four slabs of the concrete platform were joined together or attached in any way to the walls next to the slabs. This is a very important point because the slabs were supported 100% by sand. If the sand consolidated, as the Tax Court and the

Engineer thought, one or more of the patio slabs would have dropped downward. Since the record clearly and repeatedly shows that none of the patio slabs dropped downward even a fraction of an inch in 7 years following construction, this proves conclusively that consolidation of sand did not occur and this theory of the Engineer and the Tax Court was erroneous.

(f) A theory about the sinking of the sand is of little value unless there is evidence to prove the theory is correct or valid. There was no evidence whatsoever produced at the trial to prove that compaction did in fact occur. In fact, the evidence proves it did not occur. What would have happened if there had been sinking of the sand under the patio slabs, as thought by the engineer and the Tax Court? If the sand sunk down, one would expect to find the greatest amount of sinking on the front part of

the patio nearest the lake because the sand in that location was the deepest. Suppose it sunk down an inch, which would be an awful lot, there would be no actual damage from such compaction. The slant of the concrete platform would have been increased and the drainage would have been better. It certainly would not have pushed out the side walls so far that it looked as though they would collapse and damage these walls so badly that they had to be completely replaced. It certainly would not cause $20,000 in damage.

(g) The Tax Court Decision of page 6 states: "Rain gauges maintained by the Corps of Engineers near the Clark Hill area indicated that no unusual storms had occurred during that period and the amount of rainfall was about normal." This was another error because the Engineer in his Engineering Report on page 2 reports a huge rainfall of 2.83

inches during the period. The Engineer said a rain of this size can be expected to occur possibly once a year, indicating it was probably the biggest of the year.

(h) Another error of the Tax Court occurred on page 11 of the Decision. This erroneous statement was as follows: "He has not proven that any sudden, identifiable event occurred that caused the damage to the slab." How can that possibly be stated when the petitioner in the record clearly identified numerous times exact events that caused the damage, the sunken ground and asphalt, and also the earthen dam? (Tr. 18, 20, 21, 23, 24, 35, 36, 37, 46, 117, 118, 125, 126) It is obvious these identifiable causes of the damage were sudden because the sunken ground and sunken asphalt and the earthen dam were not there on one visit to the lake site and were there on the next visit. What could be more sudden than that for a taxpayer who had been away from his

property for several weeks?

(i) At the conclusion of the Decision, the Tax Court made another error when it listed four cases that it said were cases similar to the current case. In my briefs, it was shown that none of the cases were in any way similar to the case being considered. The fact that the Tax Court said the cases were similar to the current case is proof the court did not understand the facts of the case it was considering. If a Tax Court makes numerous errors in determining the facts of a case, it is impossible for the court to reach proper conclusions and to make a fair and correct decision.

3. PETITIONER HAD NO CHANCE TO WIN A FAVORABLE DECISION IN THE APPEALS COURT, BASED ON STATISTICS BY THE CLERK OF THE COURT.

I have one last important reason why I think the writ should be granted. When I appeared in oral argument before the

appeals court in Atlanta, the case was publicized because I was representing myself and oral arguments for pro se cases are apparently somewhat unusual in the Atlanta Appeals Court. A reporter for the Atlanta Journal covered the case and noted in an article Friday, October 5, that the case "while saving Pryor attorney fees, was bound to get him nowhere in his case. Spencer D. Mercer, Clerk of the Eleventh Circuit, noted Thursday afternoon that in all his years with district courts and circuit courts, he had never seen anyone win who represented himself."

As I started my oral argument before the Atlanta Appeals Court and explained that I had represented myself in the Tax Court and was also representing myself before the circuit court, U.S. District Judge Edward Dumbauld said: "Are you familiar with the maxim that anyone who represents himself before a court has a fool for a client? You may consider this

as your Miranda warning." I think those terse words key noted what happened to me in the Appeals Court. No wonder I received an affirm decision, even though I explained for the court what seemed to me like one of the worst erroneous decisions in the history of the U.S. Tax Court.

One of the main functions of the Supreme Court is to supervise the lower courts. It appears to me that there is prejudice in the Eleventh Circuit Court of Appeals against a person representing himself, if the statistics quoted by Mr. Mercer are accurate. Any reasonable person looking at Mr. Mercer's statistics would conclude that a petitioner pro se may not win in an Atlanta Appeals Court even if 100% right and the Respondent 100% wrong. If a person represents himself in the courtroom, I think such a person should be entitled to the same fairness and justice as anyone else and if he

doesn't receive it, he has not received what the U.S. Constitution promises him as a constitutional right, which should be of serious concern to members of the Supreme Court.

I hope and pray that the Supreme Court will closely examine cases such as this one and make sure that an affirm decision is made because a party is wrong in the dispute and not merely because the person represented himself before the court. If prejudice is obvious, based on these alarming statistics, the Supreme Court as supervisor of lower courts should take corrective action to eliminate such miscarriage of justice by this Atlanta Court. The Supreme Court is the only judicial body that can correct such prejudice by an appeals court. To do nothing after the injustice has been pointed out would represent sanction of this lack of due process in this lower court.

CONCLUSION

Robert Stern, author of Appellate Practice in the United States, says that you will find there are some cases where the judicial process of the under court has gone haywire. I submit that this case is a perfect example of such a haywire decision, possibly one of the worst decisions in the history of the U.S. Tax Court. This was not a wrong or clearly wrong decision. This was a shockingly wrong decision since it was based on a wide assortment of flagrant errors and erroneous conclusions by the Tax Court and also no evidence whatsoever to support the position of the respondent or the Decision of the Tax Court, which the Supreme Court has called lack of due process. The Appeals Court sanctioned this shocking departure from the accepted and usual course of judicial proceedings by the under court, which means this petitioner pro se did not receive due

process of law in the Appeals Court. Both of the decisions for the courts below call for an exercise of the Supreme Court's supervisory powers. For the foregoing reasons, I respectfully request that a writ of certiorari be granted to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Petitioner Pro Se
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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition has been made on respondents by mailing copies thereof on this 19 day of November 1984 in an envelope, with postage prepaid, properly addressed to the following:

Four copies: Michael L. Paup
Chief, Appellate Section
U.S. Department of Justice
Tax Division
Washington, DC 20530

Three copies: The Solicitor General
Department of Justice
Washington, DC 20530

All parties required to be served have been served.

James J. Pryor
Petitioner, Pro Se

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8871

JAMES J. PRYOR,

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the Decision of
the United States Tax Court

(October 16, 1984)

Before TJOFLAT and JOHNSON, Circuit Judges, and DUMBAULD*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

APPEAL D

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*Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

T. C. Memo. 1983-695

UNITED STATES TAX COURT
WASHINGTON

JAMES J. PRYOR, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 8595-81 Filed Nov. 23, 1983.

Held: Petitioner failed to prove that damage to a concrete slab supporting his mobile home and forming a patio was due to a casualty within the meaning of section 165(c)(3), I.R.C. 1954.

James J. Pryor, Pro Se.

Bonnie L. Cameron, for the respondent.

APPENDIX B

MEMORANDUM FINDINGS OF FACT AND OPINION

DRENNEN, Judge: Respondent determined a deficiency of $1,616.20 in petitioner's 1976 Federal income tax.[1] After concessions, the issue for decision is whether petitioner, James J. Pryor, is entitled to a casualty loss deduction in 1976.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of the facts and the attached exhibits are incorporated herein by reference. Petitioner, James J. Pryor, (Petitioner), at all times pertinent hereto, was a dentist and resided in Augusta, Ga. at the time the petition was filed. Petitioner timely filed his 1976 Federal

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[1] The statutory notice of deficiency was issued to petitioner, James J. Pryor, and his wife, Iris H. Pryor. However, only petitioner filed a petition with the Court.

income tax return with the Internal Revenue Service Center, Chamblee, Ga.

In June 1966 petitioner purchased a waterfront lot located within the Clark Hill Reservoir area at Modoc, McCormick County, S.C. The lot sloped rather steeply from a road up the hill down to the water.

In June 1969 petitioner made arrangements with Major Byron McGuire (McGuire), to construct a concrete slab part way down the slope large enough to place a mobile home on it and provide a patio attached to the rear of the home overlooking the water. McGuire was a retired Air Force pilot who had a land clearing business of his own nearby. The concrete slab constructed by McGuire was 60-70 feet wide, about four inches thick and was deep enough to contain the mobile home on the uphill side and provided a patio about 12 feet deep clear across the width of the mobile home on the downhill side.

A retaining wall about five feet high and constructed with concrete blocks was built under the downhill edge of the slab to support the slab. Concrete block side walls were also built from the ground up to the side edges of the slab and connecting to the retaining wall. The sloping ground under the mobile home was leveled off, a layer of sand was spread on it, and that part of the slab supporting the home was placed on the leveled area. Because of the steep slope of the land a cavity was left under the patio portion of the slab. This cavity, enclosed by the retaining wall and the two side walls, was filled with sand to support the patio and the patio slab rested on the sand and the walls. This sand was compacted with a scraper and a roller. There is some uncertainty whether "weepholes" to let water drain out were left in the walls but a "French" drain outlet was installed.

The front of the mobile home was on the uphill side of the slab. An asphalt driveway was constructed from the road down to a leveled off parking area in front of the house. An asphalt curbing was constructed at the downhill end of the parking area to divert water coming down the hill to the sides of the home. A 3½ foot retaining wall was built between this curb and the home across the front of the house. The sloping area between the driveway curb and the retaining wall was filled with sand and ivy was grown thereon. The parking area was sloped slightly to the left to divert water coming down the driveway to the left of the home and down the hill to the reservoir.

Petitioner and his wife did not visit the lake cottage frequently in the winter months. When they visited the place in February of 1976, they discovered that the concrete patio slab had cracked and

collapsed or settled in places, and the side walls supporting the slab had bulged to the point that they might collapse. They also discovered that a part of the paving in the parking area had settled and that a part of the curbing along the parking area had broken away which permitted water to drain into the sandy, ivy covered, area in front of the mobile home.

Petitioner did not remember when he has last been at the mobile home, but assumed that it was probably in November or December of 1975. At that time petitioner did not notice any damage to the patio slab or the parking area.

Petitioner did not recall that there had been any unusually heavy rainstorms in the Clark Hill area between November of 1975 and through February of 1976. Rain gauges maintained by the Corps of Engineers near the Clark Hill area indicated that no unusual storm had occurred

during that period and that the amount of rainfall was about normal.

The retaining wall in front of the mobile home and the method of construction utilized by petitioner allowed water from any source, whether rain or overflow from the parking area, or a combination of both, to percolate down through the sand and ivy area between the parking area and the retaining wall, and to seep under, instead of over, the concrete slab on which the home was placed. The percolation of water through the sand underneath the slab would cause the sand to consolidate and compact, thereby lowering the level of the sand and removing the support the sand gave to the concrete slab. Also, if there were no outlets for the water through the retaining and side walls under the patio, water could percolate through the sand in the area and form pools at the bottom of the cavity under the patio, thereby weakening the support for the patio slab.

Petitioner did not claim a deduction for a casualty loss on his income tax return for 1976. The only adjustments to income made in the statutory notice of deficiency concerned unreported interest and dividend income. In his petition filed in this Court petitioner did not dispute those adjustments, but did claim a $20,000 casualty loss deduction for the damage to the concrete slab and the mobile home. Petitioner's appraisers estimated that the decrease in the value of the property caused by the cracking and collapse of the concrete slab was $20,000. Respondent's engineer estimated that in 1976 it would have cost $2,600 to repair the damage.

Petitioner had no insurance on the Clark Hill Reservoir property. Nor has he made any claim against McGuire or anyone else for faulty construction of the property.

OPINION

The sole issue is whether petitioner is entitled to a $20,000 casualty loss deduction in 1976. Petitioner contends that the damage to the concrete slab resulted from a casualty within the meaning of section 165(c).[2] Respondent contends that petitioner has failed to show that the concrete slab was damaged as the result of a casualty within the meaning of section 165(c), or alternatively, that petitioner's loss is limited to the cost of repairing the concrete slab, which is $2,600. We agree with respondent that petitioner has failed to prove that the concrete slab was damaged as a result of a casualty.[3]

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[2] All section references are to the Internal Revenue Code of 1954, as amended, and in effect for the taxable year in issue.

[3] Due to our holding, it is unnecessary to determine the amount of the damage or loss.

Section 165(c) allows a taxpayer to deduct a loss not compensated for by insurance or otherwise. In the case of individuals, section 165(c)(3) provides for the deduction of losses of property not used in a trade or business, or not used for the production of income, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. The term "casualty" as used in the statute means an accident, a mishap, some sudden invastion by a hostile agency; it excludes the progressive deterioration of property through a steadily operating cause. Mitchell v. Commissioner, 42 T.C. 953, 972 (1964); Fay v. Helvering, 120 F.2d. 253 (2nd Cir. 1941). Nor is a loss deduction allowed if the damage is due to the ordinary action of the elements upon a poorly constructed building. Matheson v. Commissioner, 54 F2d. 537 (2nd Cir. 1931), affg. 18 B.T.A. 674 (1930); Purdy v. Commissioner, T.C. Memo. 1966-186.

Petitioner bears the burden of proving that he sustained a casualty within the meaning of section 165(c)(3). Kemper v. Commissioner, 30 T.C. 546 (1958); Rule 142(a), Tax Court Rules of Practice and Procedure. He must prove the nature of the casualty, when it occurred, and that the loss was a direct result of the casualty. Purdy v. Commissioner, supra.

In this case petitioner has failed to establish that the damage to the concrete slab was the result of a casualty within the meaning of section 165(c)(3). He has not proven that any sudden, identifiable event occurred that caused the damage to the slab. There is no proof that an unusually large storm or any underground disturbance occurred that might have caused the slab to crack and collapse. And, petitioner cannot point to any particular time when a "sudden" event occurred which might have caused the damage. He has only shown that when he last saw the

property, three or four months before he discovered the damage, he had not observed any cracks or subsistence of the slab. But this does not establish that any identifiable event, similar to a fire, storm or shipwreck, caused the slab to crack and settle. It is quite possible that the cracks occurred within a short period of time but petitioner has failed to prove that the cracks were caused by a "casualty."

The most reasonable explanation of how the damage occurred is that because of the steeply sloping terrain and the construction design utilized by petitioner, normal rain water running down the driveway or falling on the ivy had percolated down through the sand under the ivy and seeped through the sand under the slab, thereby consolidating the sand so that over a period of time the sand settled away from the slab and left the slab with no direct support except the walls. The

walls themselves may have been weakened, or had additional stress placed on them by this consolidation process, but in any event they were not strong enough alone to support the slab, so it began to crack and settle.

It is reasonable to believe that when the curbing around the parking area broke away from the pavement this allowed more water into the ivy bed and may have speeded up the process. But there is nothing to indicate that this breaking away of the curbing from the pavement was caused by any sudden event or even any action that occurred in a relatively short period of time. There was no unusually heavy rain storm that would cause so much water to rush down the driveway that that alone would cause the curbing to break away. In all likelihood the intermittent pressure of rain water running against it from time to time over an extended period of time caused it to break away. We might

add that even if it had been proven that the break in the curb was caused by a particularly heavy storm, there is no evidence that this alone could have been responsible for the damage. This might have simply accelerated the gradual progressive deterioration that had been going on for some time.

Petitioner's effort to prove that the concrete slab and retaining walls were properly designed and constructed are to no avail. He must prove that some identifiable event such as an accident, mishap or sudden invasion by a hostile agency was the cause of the damage. This he has failed to do. We therefore conclude that petitioner is

not entitled to a deduction for a casualty loss in 1976.[4]

Decision will be entered for respondent.

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[4]For cases reaching the same conclusion on somewhat similar facts, see Matheson v. Commissioner, 54 F.2d 537 (2nd Cir. 1931), affg. 18 B.T.A. 674 (1930); Portman v. U.S., 683 F.2d 1280 (9th Cir. 1982); Purdy v. Commissioner, T.C. Memo. 1966-186; Rountree v. Commissioner, T.C. Memo. 1968-165.